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NOTES.

STATE REGULATION OF THE SALE OF PATENT RIGHTS AND PATENTED ARTICLES.—It is obvious that, in determining the extent to which the police power will justify State legislation affecting patent rights and privileges, a careful distinction must be made between the patent right and the patented article which results from the invention. The patent right is a peculiar kind of incorporeal property, *Stephens* v. *Cady* (1852) 14 How. 528, created by and depending for its very existence upon an exclusive grant from the federal government to the patentee. *Gaylor* v. *Wilder* (1850) 10 How. 477, 494; *Patterson* v. *Commonwealth* (Ky. 1875) 11 Bush 311. The patented article on the other hand is simply a part of the common mass of property existing within the state, differing from other corporeal property only in that one man or company has the exclusive right of manufacture and sale. *Patterson* v. *Kentucky*, supra; *Webber* v. *Virginia* (1880) 103 U. S. 344.

With regard to state police regulation of the sale of patent rights, there is great conflict of authority, the question never having been passed on by the Supreme Court of the United States. In several jurisdictions the courts have refused to uphold even the slightest exercise of the police power by the state to regulate the sale of patent rights as being obstructive of the rights vested in the patentee under a federal power, which is exclusive. U. S. Const. Art. I, Sec. 8. Thus statutes requiring the filing or submitting for examination of duly authenticated copies of the letters patent before sale of the patent right, *Pegram* v. *American Alkali Co.* (1903) 122 Fed. 1000; *Crittenden* v. *White* (1876) 23 Minn. 24; *Wilch* v. *Phelps* (1883) 14 Neb. 134; *Hollida* v. *Hunt* (1873) 70 Ill. 109, or the issuance of a license to sell, *Commonwealth* v. *Petty* (Ky. 1895) 29 L. R. A. 786, and statutes requiring that promissory notes given for patent rights shall indicate such fact on their face, *Cranson* v. *Smith* (1877) 37 Mich. 309; *Hollida* v. *Hunt* (1873) 70 Ill. 109; *Helm* v.

Bank (1873) 43 Ind. 528 (substantially overruled in *Brechbill* v. *Randall* (1885) 102 Ind. 528, and *New* v. *Walker* (1886) 108 Ind. 365), have been held unconstitutional.

It is believed, however, that the better authority is represented by those cases allowing a reasonable police regulation by the state. It will be readily recognized that patent rights, because of their incorporeal and elusive nature and because of their depending solely upon a grant from Congress for their very existence, readily lend themselves as a class to deceit, and have been for this reason prolific sources of fraud and imposition. See *Reeves* v. *Corning* (1892) 51 Fed. 774, 787; *Mason* v. *McLeod* (1896) 57 Kan. 105; *Brechbill* v. *Randall* (1885) 102 Ind. 528. Now, admitting that the existence of an "exclusive" power in Congress does not entirely preclude the state's power to establish ordinary police regulations, *Patterson* v. *Kentucky* (1878) 97 U. S. 501, the states may readily be justified in legislation directed against patent rights for the purpose of preventing fraud. Consequently, statutes requiring that promissory notes be given for patent rights shall indicate such fact upon face, *Tod* v. *Wick* (1881) 36 Oh. St. 370; *Herdic* v. *Roessler* (1881) 109 N. Y. 127; *Haskell* v. *Jones* (1878) 86 Pa. 173, and statutes requiring in addition that copies of the letters patent should be filed or submitted for examination before sale is allowed, *Mason* v. *McLeod*, supra; *Reeves* v. *Corning*, supra; *New* v. *Walker* (1886) 108 Ind. 365, should be upheld. In support of this view, it is to be observed that the sole purpose of the patent laws is to secure to the patentee the *exclusive* right, not the *abstract* right to make, use and vend the invention. *In re Brosnahan* (1883) 18 Fed. 62; *Jordan* v. *Overseers* (1831) 4 Ohio 294. The statutes under discussion in the cases cited in no way interfere with the exclusiveness of the right of sale, but simply impose such regulations upon the method of its exercise as are reasonably necessary for public protection.

With respect to patented articles less hesitation has been encountered in according to the states a right of regulation. It is universally held that the state may impose reasonable police regulations upon the sale of certain classes of property, even though such classes include patented articles. Thus, statutes prohibiting the sale of all articles of a dangerous character, *Patterson* v. *Kentucky*, supra; *Palmer* v. *State* (1883) 39 Oh. St. 236, statutes requiring agents to take out licenses before selling articles manufactured in another state, *Webber* v. *Virginia*, supra, statutes requiring peddlers to take out a license before selling wares, *People* v. *Russell* (1883) 49 Mich. 617, and statutes requiring those practicing medicine and incidentally selling drugs to belong to the medical society, *Jordan* v. *Overseers*, supra, have all been upheld as valid statutes, even though the sale of some patented articles may be thereby regulated.

It has recently been held, however, that a statute, requiring that all notes given in payment for patented articles should indicate that fact upon face, was unconstitutional. *Ozan Lumber Co.* v. *National Bank* (C. C. A. 1906) 145 Fed. 344. This result is reached upon the ground that patented goods are not so separate and distinct from similar unpatented goods as to justify legislation in respect of them as a class, a position which is clearly to be supported. See *Webber* v. *Virginia*, supra. The effect is to declare generally against state regulation of patented articles

other than that which is incidental to a general regulation of the class of property in which they are included. This reiteration of the principles of unjust discrimination cannot affect the regulation of property, itself forming a recognized class. It seems clear, therefore, that the decision should not be taken as indicative of an attitude on the part of the federal courts adverse to the provision found generally in our states requiring notes given for patent rights to contain an indication of that fact, the validity of which has so divided the State tribunals.

LACHES AS A GROUND FOR AFFIRMATIVE RELIEF.—In explanation of the doctrine of laches it has frequently been said that "nothing can call forth the court of chancery to action but conscience, good faith and reasonable diligence." *Smith* v. *Clay* (1767) Amb. 645; *Piatt* v. *Vattier* (1835) 9 Pet. 405, 417. This statement, in so far as it creates the impression that laches may arise from mere lapse of time, *Tennyery* v. *Ransom* (1898) 170 Mass. 303, as witnessed in the view that the reason beneath the doctrine is equity's abhorrence of delay, *Wiggin* v. *Machine Co.* (1894) 68 N. H. 14, is inadequate. *Oliver* v. *Piatt* (1845) 3 How. 333; *Boyce* v. *Dantz* (1874) 29 Mich. 146. Laches, properly, is found only in cases where the defendant has been prejudiced, *Gunton* v. *Carroll* (1879) 101 U. S. 426; *Att'y Gen'l* v. *Algonquin Club* (1891) 153 Mass. 447, as by incurring expenditure, *Hulme* v. *Shreve* (1837) 4 N. J. Eq. 115, to the plaintiff's knowledge, *Baltimore etc. Ry. Co.* v. *Strauss* (1872) 37 Md. 237, or by the occurrence of events which destroy or impair evidence. *MacKnight* v. *Taylor* (1843) 1 How. 161; *Loomis* v. *Brush* (1877) 36 Mich. 40. And in the majority of cases which adopt mere delay as sufficient some such element is found to exist. See *Bassett* v. *Company* (1867) 47 N. H. 426. Where not found, the discretion of the court is almost universally restricted to seeking analogies in the statute of limitations, *Ferson* v. *Sanger* (1845) Fed. Cas. No. 4,751, although some courts seem to have adopted a ten year rule for such cases. *Flemming* v. *Reed* (1872) 37 Tex. 152. Both these practices rest upon the probability arising from long lapse of time that a claim has been settled and evidence of such settlement lost. *Loomis* v. *Brush*, supra. So, when circumstances are shown which render it improbable that such evidence ever existed, the court will refuse to apply strict limitations not expressly binding upon it, and will grant its relief beyond such periods. *Glasscock* v. *Nelson* (1861) 26 Tex. 150. It is, therefore, evident that the true touchstone of the doctrine of laches is to be found not in the abhorrence of delay but in the fear of doing injustice.

But a discovery of the motive underlying the doctrine leaves unsettled the more interesting question of the extent to which it may properly be used. In a recent case a court of equity has held that failure by a ward to seek an account for nine years and until the death of his guardian, was ground for enjoining suit against the estate of the bond surety, the guardian's representatives being unable to account for lack of evidence. The result was reached on the ground of the laches of the plaintiff at law, no fraud being shown. *Clark* v. *Chase* (Me. 1906) 64 Atl. 493. This raises squarely the question whether equity will interfere with a party's